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IN THE

# SUPREME COURT OF THE UNITED STATES.

October TERM, 1942

ELIZABETH LIGGETT KENNARD,
Respondent,

v.

ELLA L. WIGGINS,
Petitioner.

No. 224

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION 1.

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## INDEX.


| | Page |
|---|---|
| Caption | 1 |
| Short statement of judgment to be reviewed | 2 |
| Explanatory note | 3 |
| Jurisdiction | 3 |
| Questions presented | 3 |
| Constitutional and statutory provisions here involved | 5 |
| Summary statement of the matters involved | 6 |
| Summary of primary question presented | 7 |
| History of the controversy. Early family history | 9 |
| Daughters' suit to construe the Liggett will | 10 |
| Decision of state supreme court, affirming will decree; opinion and mandate | 14 |
| Later family history, and litigation | 15 |
| Statutory right to obtain review of will decree neglected by Mrs. Kennard | 16 |
| (1) Mrs. McIntosh's first federal suit | 16 |
| (2) The instant suit in the state circuit court, and the companion suit, McIntosh v. Wiggins, in the federal district court | 16 |
| (3) The nunc pro tunc motion or suit | 17 |
| The instant Kennard case and the companion McIntosh case; prosecution renewed | 20 |
| The decision below | 22 |
| Opinions and rulings below, and in McIntosh v. Wiggins, a companion case on many points here involved | 32 |
| Reasons relied on for allowance of the writ | 33 |
| Prayer | 36 |

**Cases Cited.**

Anderson v. Biddle, 9 Mo. 580 ..... 34

Cantwell v. Johnson, 236 Mo. 575, at 600, 601; 139 S. W. 365, at 374 ..... 34, 35

Fiene v. Kirchoff, 176 Mo. 516, at 522, 526, 527; 75 S. W. 608, at 609-611 ..... 35

Giozza v. Tiernan, 148 U. S. 657, at 662; 37 L. Ed. 599, at 601 ..... 34

Gorman v. Washington University, 62 Sup. Ct. Rep. 962, at 963 ..... 33

Harburg v. Arnold, 87 Mo. App. 326 ..... 34

Kennard v. Wiggins, 160 S. W. 2d 706 ..... 1, 32

Knox County v. Harshman, 133 U. S. 152, at 154; 33 L. Ed. 586, at 588 ..... 34

McIntosh v. Wiggins, 123 F. 2d 316, at 319; 321, 322; certiorari denied March 2, 1942, 62 S. Ct. 800; rehearing denied March 30, 1942, 62 S. Ct. 914 ..... 17, 21, 22, 32, 34, 35

Marshall v. Holmes, 141 U. S. 589, at 596; 35 L. Ed. 870, at 873 ..... 34

Missouri ex rel. Mo. Ins. Co. v. Gehner, 281 U. S. 313, at 319-320; 74 L. Ed. 870, at 875, 876 ..... 36

Padgett v. Smith, 205 Mo. 122 ..... 34

Perkins v. St. L. K. C. & Col. R. R. Co., 143 Mo. 513, at 519; 45 S. W. 260, at 261 ..... 34

Perry v. Wiggins, 57 F. 2d 622, at 625; certiorari denied, Oct. 10, 1932; rehearing denied November 7, 1932; 287 U. S. 609 (77 L. Ed. 529) ..... 21

Saunders v. Shaw, 244 U. S. 317, at 320; 61 L. Ed. 1163, at 1165, 1166 ..... 36

Scott v. McNeal, 154 U. S. 34, at 45; 38 L. Ed. 896, at 901 ..... 33, 34

Spotts v. Spotts, 331 Mo. 917, at 921, 924, 930-931, 931, 932; 55 S. W. 2d 977, at 978, 980, 983, 983-984 ..... 34, 35

U. S. v. Throckmorton, 98 U. S. 61, at 68; 25 L. Ed. 93, at 96 ..... 35
Wiggins v. Perry, 119 S. W. 2d 839, at 843, 842, 843-844, 844 .....18, 19, 35
Wiggins v. Perry, 271 S. W. (Mo.) 815.....2, 3, 14

**Statutes Cited.**

Section 1 of Amendment XIV to the Constitution of the United States .....3, 4, 5, 28, 33, 34
Section 4, of Amendment of 1890, to Article VI of the Constitution of Missouri; Rev. Stats. of Mo., Vol. I, page 127c .....3, 5, 29, 33
Section 237 (b) of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 1, 43 Stat. 937 (28 U. S. C. A., § 344)..... 3
Section 240 of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 8 (a, b, d), 43 Stat. 940 (28 U. S. C. A., § 350)..... 3
Section 563, Revised Statutes of Missouri, 1939..... 23
Section 568, Revised Statutes of Missouri, 1939.....6, 28
Section 1200, Revised Statutes of Missouri, 1939.....6, 34
Section 1202, Revised Statutes of Missouri, 1939.....6, 34
Section 3500, Revised Statutes of Missouri, 1939..... 23

**Text Cited.**

34 C. J., Sec. 782, p. 495..... 34

**Rule of Court Cited.**

Rule 38 of the Supreme Court of the United States... 3

## INDEX TO SUPPLEMENTAL PORTION OF TRANSCRIPT OF RECORD.


| | Record Page |
|---|---|
| Original opinion, July 25, 1941 | 243 |
| Appellant's motion for rehearing, (filed Aug. 4, 1941). | 255 |
| Appellant's motion to withdraw and modify the opinion, (filed Aug. 4, 1941) | 274 |
| Suggestions of Charles S. Reber, amicus curiae, (filed Aug. 11, 1941) | 289 |
| Reply to suggestions of Charles S. Reber and to appellant's motion for a rehearing and to modify the opinion, (filed Aug. 21, 1941) | 300 |
| Appellant's motion for leave to file printed copies of majority and minority opinions in McIntosh case.. | 305 |
| Copies of above opinions | 307 |
| Petition for rehearing in *McIntosh* case | 321 |
| First modified opinion, Dec. 16, 1941 | 351 |
| Appellant's motion for rehearing in respect of the court's first modified opinion, (filed Dec. 26, 1941).. | 365 |
| Appellant's motion to transfer, (filed Dec. 26, 1941).. | 375 |
| Suggestions in opposition to motion to transfer | 381 |
| Additional suggestions of Charles S. Reber, amicus curiae | 382 |
| Second modified opinion, Feb. 26, 1942 | 393 |
| Appellant's motion for rehearing in respect of the court's amended decision rendered Feb. 26, 1942... | 406 |
| Appellant's motion to transfer to court in banc in respect of court's decision of Feb. 26, 1942 | 433 |
| Respondent's suggestions with respect to appellant's third petition for rehearing and appellant's second motion to transfer to the court in banc | 435 |

Overruling of appellant's last above motion for rehearing and motion to transfer..... 440
Motion for stay of mandate (to 5/16/42)..... 441
Stipulation for stay of mandate (to 6/16/42)..... 442
Stipulation re Physical Exhibit ..... 443
Stipulation for further stay of mandate (to July 15, 1942) ..... 444
Amended praecipe ..... 445

IN THE

# SUPREME COURT OF THE UNITED STATES.

October TERM, 194.2

ELIZABETH LIGGETT KENNARD,
Respondent,

v.

ELLA L. WIGGINS,
Petitioner.

No. .....

## PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Ella L. Wiggins, respectfully prays that a writ of certiorari shall issue to review the judgment and decree of the Supreme Court of Missouri, Division One, entered on July 25, 1941 (R. 243), in the above-entitled cause (*Kennard v. Wiggins*), being No. 36,396 on the docket of said Supreme Court of Missouri, Division One, to the May Term, 1941, which judgment affirmed a decree rendered by the state circuit court of the City of St. Louis, Missouri, on February 5, 1940. Said judgment of said Division One of said state supreme court was entered on the same day that said court rendered its first decision (opinion) in said cause. Thereafter two modified opinions were handed down, without modifying said judgment. The second or last modified opinion was rendered February 26,

1942 (R. 392-405), and Petitioner's "Motion for Rehearing" and "Motion to Transfer to said Court in banc," addressed to said final decision, were overruled on April 16, 1942 (R. 440-441), after Petitioner's motion for rehearing and motion to modify, addressed to said original opinion, and Petitioner's motion for rehearing and motion to transfer to said court in banc, addressed to said first modified opinion, had been overruled (R. 351, 392).

**Short Statement of Judgment to Be Reviewed.** The Respondent in the instant petition for a writ (Mrs. Elizabeth Liggett Kennard, née Scudder) brought this action on March 20, 1931 (R. 1), asking that Ella L. Wiggins (defendant in said cause and Petitioner herein for a writ) be required to turn over to Mrs. Kennard a one-twelfth interest in certain real and personal property, together with the rents and profits therefrom, and that Mrs. Wiggins be enjoined from having the benefit of an earlier decree of the State Circuit Court, City of St. Louis, entered June 22, 1923, construing the will of John E. Liggett, affirmed on appeal in *Wiggins v. Perry*, 271 S. W. (Mo.) 815. Upon said will construction decree Mrs. Wiggins bases her claim of right—as tenant for her own life of said interest in said property—to withhold from Mrs. Kennard the possession and rents and profits thereof, here in dispute. Said property derived from trust estates created by the will of said John E. Liggett, father of Mrs. Wiggins and great-grandfather of Mrs. Kennard.

Said state circuit court, by its decree entered in the instant cause, granted to Mrs. Kennard the relief requested by her, and from said decree Mrs. Wiggins duly appealed to the supreme court of Missouri, where Division Number One of said court affirmed said decree of the state circuit court, and on April 16, 1942, denied motions of Mrs. Wiggins for rehearing and to transfer said cause to said state supreme court in banc.

**Explanatory note.** The supplemental portion of the certified Transcript of Record herein (R. 243-450) was not indexed in the printing of said portion. Therefore, a subject index of said supplemental matter appears among the indices at the front of this Petition.

In this petition and the supporting brief, (for brevity and convenience) references will sometimes be made to Petitioner as Mrs. Wiggins; to Respondent as Mrs. Kennard; to the Certified Transcript of the Record herein as "R. ..."; to the Physical Exhibit filed herein, as "Phy. Ex. ..."; to the early suit in the state courts *Wiggins v. Perry*, 271 S. W. 815 (not officially reported), that construed the Liggett will, as the "will construction suit" or "will suit"; and to the decree of the state circuit court therein as the "will construction decree" or "will decree." Additional convenient references will be made later. All italics herein are ours unless otherwise stated in particular instances.

**Jurisdiction.** The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 1, 43 Stat. 937 (28 U. S. C. A., § 344); also under Section 240 of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 8 (a, b, d), 43 Stat. 940 (28 U. S. C. A., § 350), and under Rule 38 of this Court.

**Questions Presented.** I. Whether the Supreme Court of Missouri (Division One) denied to Petitioner (Mrs. Wiggins) the "due process of law" guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motion that said Division One of said court transfer the instant case to said entire State Supreme Court (In Banc) as required by the Constitution of Missouri, Article VI; Section 4 of Amendment of 1890; R. S. Mo. 1939, Vol. 1, page 127c, in cases when "a federal question is involved."

II. Whether said state court denied to Petitioner such due process of law, by failing to sustain her contention, supported by the established doctrine of said court and of this Court, that even if Petitioner had been guilty of the alleged fraud in said court, Respondent could not recover against Petitioner in this direct attack in equity to have the disputed paragraph of the will construction decree held void, because Respondent had completely neglected to avail herself of the prompt, available and adequate other remedy, provided by the statutes of Missouri by suing out a writ of error from said state supreme court within three years after she became twenty-one years old,—by which writ she could have obtained complete relief from the alleged consequences of the alleged fraud, accident, or mistake, by having the decree corrected if wrong, and if prejudicial to Respondent.

III. Whether said state court denied to Petitioner such due process of law, by holding and adjudging that the pleadings and proof in the instant case "amply support the judgment below," and accordingly by affirming the decree herein of the state circuit court in favor of Respondent (Mrs. Kennard) and against Petitioner (Mrs. Wiggins), although said decision of said supreme court was not supported by any substantial evidence as against Mrs. Wiggins, and being wholly arbitrary as to her, unlawfully deprived her of her property without due process, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States.

IV. Whether said court denied to Petitioner such due process of law: (1) by arbitrarily and unjustly penalizing her by its decision and judgment, for the acts of the attorney for Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state circuit court to construe the Liggett will in harmony with said contention,—acts for which Peti-

tioner was not responsible in any way; (2) by arbitrarily and unjustly penalizing her for the long delay caused chiefly by Respondent's having neglected to sue out a writ of error within the time allowed by state statute and also caused by said act of the attorney for Respondent's guardian in making on her behalf the above-mentioned affirmative defense; and (3) by arbitrarily and unlawfully holding, contrary to the law and the undisputed evidence, that said guardian ad litem of Mrs. Kennard, in making said affirmative defense "went beyond any authority, he had" and thereby "caused a decree to be entered which limited" her "rights" (R. 404); and by thereupon treating said holding as a basis for the instant decision against Mrs. Wiggins.

V. Whether the raising of the federal question was timely, not having occurred until the case reached the state supreme court.

**Constitutional and Statutory Provisions Here Involved.** (1) Section 1 of Amendment XIV to the Constitution of the United States providing, in part, that:

> "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(2) Section 4 of 1890 Amendment to Article VI of the Constitution of Missouri; Rev. Stats. of Mo., Vol. 1, page 127c, relating partly to the State Supreme Court.

"*Sec. 4. Case transferred to court in banc, when.*— When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or *when a federal question is involved*, the cause, on the application of the losing party, *shall be transferred* to the court for its decision; or *when a divi-*

*sion in which a cause is pending shall so order,* the cause shall be transferred to the court for its decision."

(3) *Revised Statutes of Missouri of 1939:*

"*Sec. 568. Court shall have due regard to directions of will, etc.*—All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them (R. S. 1929, § 567)"; also

(4) *Section 1485,* R. S. Mo. 1919 (carried forward as Sec. 1034, R. S. Mo. 1929, and as Sec. 1200, R. S. Mo. 1939):

"*Writs of error, when to issue.*—Writs of error *upon any final judgment or decision of any circuit court,* or other court of record having concurrent jurisdiction with the circuit court, *in all cases are writs of right,* and *shall issue of course, out of the supreme court* and courts of appeals in vacation as well as in term, subject to the regulations prescribed by law"; also

*Section 1487,* R. S. Mo. 1919 (carried forward as Sec. 1036, R. S. Mo. 1929, and as Sec. 1202, R. S. Mo. 1939):

"*To issue within one year.*—All writs of error *upon any judgment or decision of any court in any case, whether civil* or criminal, shall be brought within one year after the rendering of such judgment or decision, and not thereafter; *but persons within the age of twenty-one years shall be allowed to bring their writs of error in civil cases within three years after such disability is removed;* * * *."

**Summary Statement of the Matters Involved.** Supplementing the above "Introductory Statement," the additional facts hereinafter set out are deemed necessary to an adequate "statement" of the matters here involved.

Because the opinion and decree in the instant case represent the culmination of long and varied earlier litigations in the state courts between the parties hereto, this statement, although "summary," cannot be as brief as counsel would have wished.

The form of the instant suit in the state circuit court was a direct attack on a disputed paragraph in the will construction decree, by which the trust portion of a daughter who might die without issue was held to pass to her two surviving sisters in successive life estates, so that Mrs. Wiggins as the last survivor of testator's three daughters was held to own an estate for her own life in the undivided property interest involved. The primary ground of attack was a contention that said disputed paragraph in the will decree did not correctly interpret the intent of the will, which should have been construed to vest the disputed property interests in Mrs. Kennard, and that therefore she had been prejudiced by the decree. Charging such prejudice to have occurred, the instant petition attacked the will decree directly by alleging that said disputed paragraph had been inserted in the will decree through fraud, accident or mistake occurring in the state circuit court, and had been affirmed by the state supreme court, division one, through fraud, accident or mistake occurring in said state supreme court. All these contentions were disputed by Mrs. Wiggins.

The broad questions presented in the instant case to the state supreme court, which had the case (being in equity) for decision *de novo* on Mrs. Wiggins' appeal, was whether under the facts presented by the record the state courts were required to grant Mrs. Kennard the relief she sought —as *against Mrs. Wiggins.*

*Summary of primary question presented.* In 1923, the circuit court of the City of St. Louis entered a decree (construing the Liggett will) which expressly vested in

Mrs. Wiggins as a life tenant, the trust income here in dispute. Upon appeal from said decree to the Supreme Court of Missouri, the particular paragraph of said decree vesting such rights and in dispute in the instant case, was not presented for review by any assignment of error or contention in briefs, made by any party, except to the extent that Mrs. Wiggins in claiming a fee simple title to her one-third of the trust property, made contentions completely hostile to the existence of any life estate. Upon said appeal, the Supreme Court of Missouri, Division One, did not specifically rule upon said disputed paragraph in the will decree, but by its affirmance left said decree of the circuit court in full force and effect.

In the instant case said disputed paragraph in said 1923 decree is sought to be set aside at the instance of Mrs. Kennard, upon the theory of fraud, accident or mistake committed by Mrs. Wiggins, and the state circuit court in 1940 entered its decree avoiding it. Upon review of said decree in the instant case by the Supreme Court of Missouri, Division One, it found no actionable fraud, accident or mistake to have been committed by anyone, but affirmed the vacation of the decree upon the theory that Mrs. Kennard's guardian ad litem had committed an unauthorized act in the will construction suit,—in which act Mrs. Wiggins in no way participated. Said supreme court thereby attempted to deprive Mrs. Wiggins of income vested in her by the decree of 1923, for no wrong committed by her.

The primary reason here presented for the allowance of the writ, is that the divestiture of Mrs. Wiggins' rights under the prior decree, by a subsequent decree based upon no wrong committed by her, constitutes a taking of property without due process of law.

The particular rulings made by said supreme court in the instant case, which operated to deny to Mrs. Wiggins the due process of law guaranteed to her by Section 1 of

Amendment XIV to the Constitution of the United States and thereby unlawfully deprived her of property decreed to be hers by the will construction decree, will be pointed out later herein and argued in the supporting brief.

*History of the controversy. Early family history.* John E. Liggett died November 23, 1897, a resident of St. Louis, Missouri, leaving a large estate (then consisting entirely of personal property) placed in trust by his will (R. 393). The trust periods ended April 4, 1916; thereupon the trustees became confronted with the duty to immediately distribute and convey the trust estates in accord with the intent of the will as to the titles passing to the beneficiaries entitled by the will to receive them, namely, testator's three daughters, Cora B. Fowler, Dolly L. Kilpatrick and Ella L. Scott (later Wiggins)—all married women—and his grandson John—son of the deceased son. The life interest of testator's widow had ended with her death on May 15, 1909, before the end of the trust period.

The daughters contended that they were entitled by the will to receive distribution of their respective portions in fee-simple titles, not merely life estates. Through conversions of personal assets left by the will, into real estate, the trust estate to be distributed included real estate located in St. Louis; there was also personal property,—both of large value.

Following the termination of the trusts, the then trustees filed in April, 1916, a separate "accounting" suit in the state circuit court, to which all the daughters and their descendants including Mrs. Kennard, were parties. The decree in said suit allotted to the grandson one-fourth of the trust estate in which he was to share, and three-fourths thereof to the three daughters together with the other trust estate in which the grandson did not share. The one-fourth portion thus allotted to the grandson was distributed to him under said accounting decree,

in fee-simple title (Phys. Ex. 77), but said decree expressly refrained from deciding whether the daughters took life estates or fees in the portions of the trust estates allotted and bequeathed to them, and *expressly reserved to them the right to sue later for the purpose of having said question decided.* The trust assets in which the three daughters benefited equally under the will (each in one-third) consisted of said "three-fourths" plus the other trust assets in which the grandson did not share. The contention of the daughters in the will construction suit, that they took fee titles, was prompted by said reservation in said accounting decree.

Since the attack made by Mrs. Kennard in the instant suit was based upon occurrences in the state circuit court and in the state supreme court in the will construction suit, the relevant facts in that case need to be stated adequately for the purposes of this petition.

*Daughters' Suit to Construe the Liggett Will.* Whether testator's three daughters were entitled at the end of the trust period to receive distributions in fee-simple titles, or merely for life, depended upon the construction of the following provisions of the will:

(1) The first part of the sentence disposed of the trust portions of the daughters who might die *leaving issue,* by giving said portions, after the death of testator's widow, to the daughters during their lives, in equal portions, "with remainder over as to the undivided share aforesaid, of each one, to the heirs of the body of each one of my said daughters, as their absolute property, per stirpes and not per capita."

The second part of the same sentence (being the herein disputed paragraph in the will) disposed in an entirely different manner, of the trust portion of a daughter who might die (as Mrs. Fowler did) without issue but leaving

both her sisters surviving her, thus: *"but should any of my said daughters die without issue then her portion of said * * * stock herein bequeathed to her for life shall go to the survivor and survivors of my said daughters in equal portions for life, with remainder over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes"* (R. 394).

(2) Another relevant provision was that which gave to the daughters the share of the grandson in case he should die without issue before the termination of the trust, viz.:

> "His share of my estate hereinafter devised and bequeathed to him in this will shall go to such of my said daughters as shall survive him, in equal portions for life, and to *the issue* of such of them as shall then be dead, or shall die thereafter, share and share alike, per stirpes, and not per capita; *and the last of my said daughters being dead the whole of John E. Liggett, Jr.'s share* (he being dead before he arrives at the age of thirty years, without issue), shall go to and become the property of *the issue* of such of my said daughters *as shall die leaving issue* to take per stirpes, * * *"

In May, 1920, the three daughters brought suit in the Circuit Court, City of St. Louis, to obtain a construction of the will, asserting that upon the termination of the trusts created by the will, they took fee titles to their portions of the estates. All of the then existing descendants of the testator were made parties to the suit, including among the defendants: Elizabeth Liggett Scudder (now Kennard), then a minor and a grand-daughter of Dolly L. Kilpatrick; and Mary Lois Perry (later McIntosh), an adult daughter of said Dolly L. Kilpatrick. Mrs. McIntosh was duly served with a copy of the writ and petition but stood mute and did not appear or defend in either of the state courts. Elizabeth Liggett Scudder, then almost fourteen years old,

having also been duly served, appeared and defended by her father as her duly appointed guardian ad litem. He was actively represented by the attorney who also represented other minor defendants, descendants of testator. Said attorney filed answers on behalf of said minor defendants (including Mrs. Kennard, Phys. Ex. *214), in which (and in his trial brief, Phys. Ex. *441-442) he contended that under the will the daughters took life estates only, not fee titles, in their respective shares, but with remainder over to their surviving issue, and

> "*In case there be none, with remainder as to said share to the survivor or survivors of said daughters in equal portions for life, with remainder over in fee upon the death of the last survivor of said daughters to the surviving issue of said daughters, share and share alike, per stirpes.*"

These answers prayed that the court *so* construe the will (Phys. Ex. *214).

The reply of the daughters denied these averments of new matter, putting at issue the above contention for said minor defendants, that *the portion of a daughter who might die without issue would continue to be subject to successive life estates of the surviving daughters until the death of the last daughter to survive* (Phys. Ex. *222).

In accord with procedure proved by the trial judge (Hon. Franklin Miller) to be customary in complicated equity cases, the court announced its general conclusion by filing a written memorandum for counsel (copied at Phys. Ex. 116-117), stating, in substance, that the court construed the will to the effect that the plaintiffs took life estates only with contingent remainders over in favor of the heirs, if any, of the bodies of plaintiffs respectively, * * * and directed counsel for defendants "to draft form

of decree; decree to be entered upon said draft when approved by court and filed." Thereupon the attorney for the minor defendants (including Mrs. Kennard), having taken the leading part for the defendants in the trial, drew forms for decree and submitted his successive forms to opposing counsel until both counsel thought one of them expressed the stated conclusions of the court; it was then submitted by the attorney who drew it, to each of the other attorneys in the case (R. 101-102; Phys. Ex. 146-147), and when approved by them as to form, it was submitted to said trial judge, who examined it, signed it, and handed it for filing to the clerk of said court, (R. 136-137; 290), whereupon it was entered on June 22, 1923, as the decree of said court in said will construction suit (R. 135-137; Phys. Ex. *522; a copy appears at *223-277). Counsel for the daughters did not consent to the entry of said decree (Phys. Ex. *522).

Said memorandum for counsel did not contain express instructions concerning the trial court's view of the intended disposal of the share of a daughter who might die without issue surviving her, so said attorney in drafting said form of decree assumed that the trial court had adopted his above interpretation of the will on said issue, and included it in the form of decree drafted by him (R. 298), at three different places, in adjudging the disposal of the trust portion of each of the three daughters, upon her death. The provision relating to the trust portion of Cora B. Fowler follows, the disputed part being italicized:

> The Fowler portion was adjudged to vest upon her death, absolutely, per stirpes, * * * "in her then surviving issue, if any; but *in default of such issue,* then said property shall go as follows:
>
> (1) *If both her sisters,* Ella L. Wiggins and Dolly L. Kilpatrick, *shall survive her,* then an undivided one-half interest in said property shall go to and

vest in each of said sisters for her life, and *on* the *death of either of them, the undivided one-half interest therein of the one so dying shall go to and vest in the survivor for her life,* and *upon her death the whole of said property* shall *go to and vest absolutely in the then surviving* issue of said Ella L. Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita" (R. 141-142, Phys. Ex. *268; as to the trust portion of Mrs. Wiggins, Phys. Ex. *265; as to the trust portion of Mrs. Kilpatrick, Phys. Ex. *271).

The daughters appealed to the supreme court of Missouri; said cause on appeal was *Ella L. Wiggins et al. v. Mary Lois Perry* (now McIntosh) *et al.*, No. 25,037, to the April Term, 1924, Division One of said court. A copy, almost complete, of the daughters' (appellants') printed "Abstract of Record" is in the Physical Exhibit herein, pages *163-286; also a copy of the daughters' brief (Phys. Ex. *317-408), and of the brief for the guardian ad litem of Mrs. Kennard (Phys. Ex. *287-316). The portions of special interest here, will be stated at appropriate places hereinafter, or in the supporting brief.

*No brief filed in the state supreme court in the appeal from the will decree discussed the disputed paragraph in said decree that is attacked and held void in the instant Kennard case.*

The appellants (daughters) assigned no error in respect of it. No brief made any specific contention concerning it, nor discussed what the will intended as to the disposal of the trust portion of a daughter who might die without issue leaving both her sisters surviving her.

*Decision of state supreme court, affirming will decree; opinion and mandate.*

The appeal was decided March 16, 1925, and reported only in *Wiggins v. Perry,* 271 S. W. 815. A copy is at

Phys. Ex., pages 64-112, and of the mandate and judgment, at pages 112-113.

*The opinion* did not specifically rule on the interpretive correctness of the disputed paragraph of the will decree.

*Later Family History, and Litigation.* Cora B. Fowler died without issue July 19, 1928; both of her sisters survived her. It is not disputed that thereupon her one-third of the daughters' portion of the trust estates passed under the will construction decree, in equal shares (one-sixth each), to Mrs. Kilpatrick and Mrs. Wiggins, for life.

Mrs. Kilpatrick died August 10, 1928. Her death is the real source of the instant dispute between her granddaughter (Mrs. Kennard) and her daughter (Mrs. McIntosh) on the one side, and Mrs. Wiggins on the other side. Said two descendants of Mrs. Kilpatrick had under said decree received in equal shares Mrs. Kilpatrick's *own one-third* portion of the trust estates (i. e., one-sixth each), but after Mrs. Kilpatrick's death they claimed that under the will they were also entitled to share equally in that one-half of the Fowler one-third (i. e., one-sixth) portion of the trust estates, which admittedly had passed under the decree to Mrs. Kilpatrick for life upon Mrs. Fowler's death; each of said descendants of Mrs. Kilpatrick thus claimed one-twelfth of the trust estates that had passed to the three daughters for life. Mrs. Wiggins claimed that under the will and the will construction decree, she (as the sole surviving daughter) was entitled after the death of Mrs. Kilpatrick to enjoy during her own life the entire one-half of the Fowler (one-third) portion that had passed to Mrs. Kilpatrick for life on the death of Mrs. Fowler.

So the subject matter of the instant suit (and of the other litigation) *between Mrs. Kennard and Mrs. Wiggins,*

was and is one-twelfth of the net income of the daughters' portion of the trust estates, since the death of Mrs. Kilpatrick, and the subject matter of *Mrs. McIntosh's two separate suits against Mrs. Wiggins* in the federal courts was the other and separate one-twelfth, the above derivations of title being identical.

*Statutory right to obtain review of will decree neglected by Mrs. Kennard.* Mrs. Kennard became twenty-one years old on March 10, 1928 (Phys. Ex. *577). There were then and since then in effect, two Missouri statutes, now Sec. 1200, R. S. Mo. 1939, and Sec. 1202, R. S. Mo. 1939 (copied earlier herein), that gave her the right "as of course" within three years thereafter, to sue out a writ of error from said state supreme court to review said will construction decree and thereby to obtain a review and decision on all of her contentions made in her instant suit.

Mrs. Kennard did not, within said three years, sue out such a writ of error. She had until March 10, 1931, to do so. Instead of suing out a writ of error, present counsel for Mrs. McIntosh and Mrs. Kennard began successive efforts to avoid the effect of the disputed paragraph of the will decree by conducting the following varied proceedings in the federal and state courts, all of which upon final determination have proved futile except the instant suit of *Kennard v. Wiggins.*

(1) *Mrs. McIntosh's first federal suit* against Mrs. Wiggins in the federal district court, decided for Mrs. Wiggins. The record in said case is embodied in the Physical Exhibit herein (*475-553); the decisions of the District Court and Circuit Court of Appeals will be explained later herein, or in the supporting brief. Above case lasted from June 19, 1929, to November 7, 1932.

(2) *The instant suit in the state circuit court, and the companion suit, McIntosh v. Wiggins, in the federal dis-*

*trict court.* On March 21, 1931, soon after Mrs. Kennard's three-year right to sue out a writ of error in the will case had ended, she and Mrs. McIntosh each filed by the same counsel a suit directly attacking the disputed paragraph of the will decree. A copy of the original petition in Mrs. McIntosh's said second federal suit appears at Physical Exhibit *557-570, and a copy of the first amended petition in the instant *Kennard* suit appears at Physical Exhibit *573-591. Many features of said two suits are identical. Therefore said *McIntosh* suit and its decision in favor of Mrs. Wiggins are of moment here. In it Mrs. McIntosh for the second time invoked the federal jurisdiction without success, in an effort to avoid the binding effect of the disputed paragraph of the will decree. The points relevant here, that were decided in said second suit (*McIntosh v. Wiggins*, 123 F. 2d 316), will be noted later herein (or in the supporting brief) in referring to the instant *Kennard suit.*

(3) *The nunc pro tunc motion or suit* (also referred to as the "nunc pro tunc case"). On March 31, 1933, Mrs. Kennard and Mrs. McIntosh filed in the state circuit court and in the will construction suit their joint motion for a nunc pro tunc order to change the disputed paragraph in the will decree, so that in respect of the Fowler portion of the trust estates in case of her death without issue, the decree would read in accord with their contentions in all of their other litigation against Mrs. Wiggins, i. e., would vest in them in fee titles as of the death of Mrs. Kilpatrick, to the respective undivided one-twelfth interests in the daughters' portion of the trust estates that they have been claiming.

[Soon after the filing of said nunc pro tunc motion it was agreed by counsel for said movants with counsel for Mrs. Wiggins, that pending the nunc pro tunc suit, the instant *Kennard* suit and its companion *McIntosh* suit

(making direct attacks on the will decree) would not be pressed (R. 207-208).]

*The nunc pro tunc proceeding* involved the following events in said futile efforts to change the will decree, which consumed almost five and one-half years after the filing of the motion, i. e., until September 29, 1938: (a) *On June 12, 1933,* after trial, the state circuit court denied said motion (Phys. Ex. 62); (b) on *June 27, 1933,* said movants filed in the state supreme court their joint petition for a writ of mandamus (R. 191-192), with "suggestions" in support (R. 192), to compel said circuit court to make said requested nunc pro tunc order; (c) said petition in mandamus was denied July 20, 1933 (R. 191); (d) on *September 1, 1933,* the movants appealed to the state supreme court from the adverse decision of the circuit court (Phys. Ex. 160-161), said appeal being entitled *Wiggins v. Perry,* No. 33,582, in the state supreme court (the Physical Exhibit in the instant case is a copy of the appellants' "Abstract of Record" on said appeal); (e) the state supreme court on November 12, 1936, affirmed the judgment below (R. 194; *Wiggins v. Perry,* 119 S. W. 2d 839); (f) *thereafter* movants filed a long series of supplemental motions in said appeal case, as shown in outline by the clerk's minutes (R. 194-195). The consideration of all these motions (which the court overruled) and of the supporting and opposing briefs relating to them (see also R. 196-207 for abstracts of their contents), delayed until September 29, 1938, the sending down of the mandate in the nunc pro tunc case. During this time said two direct attack suits (filed March 21, 1931) lay dormant.

*The opinion of the state supreme court in the nunc pro tunc appeal* (*Wiggins v. Perry,* 119 S. W. 2d 839) contains the following interpretive comments on portions of the same court's earlier opinion in the will construction suit, and on rulings upon certain contentions for the movants in

the *nunc pro tunc* appeal, that are important in considering the instant petition for a writ of certiorari; the respective contentions for the movants will be stated in connection with each ruling made thereon:

(1) The court declined to construe the will (R. 151; 119 S. W. 2d, at 843), but called attention to the facts: that in the will construction suit the attorney who represented *Mrs. Kennard's* guardian ad litem, in his answer for her, "placed the same construction upon the will * * * as appears in the decree"; and that the same attorney "prepared the decree that was entered upon the circuit court record" (R. 147; 119 S. W. 2d, at 842).

(2) Concerning the contention that adequate support for the requested *nunc pro tunc* entry existed in Judge Miller's memorandum and in the opinion and mandate on the appeal in the will case, the state supreme court said (R. 151; 119 S. W. 2d, at 843-844):

> "Considering the opinion and the memorandum together there may be isolated expressions in the opinion tending to support the construction contended for by movants, but from the opinion *it is clear that the court was at no time attempting to specifically rule as to whether or not the interest of a daughter dying without issue would pass to the surviving daughters successively* for life, *and would not pass to the possession of the surviving issue of a deceased daughter until the death of the last daughter.* The *chief question* before the Court was *whether the three daughters took a life estate or a fee* * * *" (R. 151).

As to the mandate in the above connection, the opinion said (R. 149; 119 S. W. 2d, at 843):

> "It will be noted that this court, in what is commonly called the mandate, adjudged that 'the judgment aforesaid, in form aforesaid, by the said circuit court of the City of St. Louis, rendered, be in all

things affirmed and stand in full force and effect.' There can be no doubt about *what judgment* is referred to in the mandate, or what is commonly called the mandate. There was only one judgment in the will construction suit before this court, and that was the judgment of the circuit court on June 23," (22), "1923" (R. 149). (Emphasis by the court.)

*The instant Kennard case and the companion McIntosh case; prosecution renewed:* On October 31, 1938, Mrs. Kennard filed her second amended petition herein (R. 2-23), on which this case was tried, and on the same day Mrs. McIntosh filed in the District Court of the United States her amended bill of complaint in her second suit against Mrs. Wiggins. In each of these suits the plaintiff attempted a direct attack on the disputed paragraph in the will construction decree, based chiefly upon the contentions: (a) That said paragraph did not correctly interpret the intent of the Liggett will, which should have been construed to vest the disputed property interest in said plaintiffs, respectively (not in Mrs. Wiggins for life), thereby prejudicing them; (b) that said paragraph had been inserted in the decree through fraud, accident or mistake occurring in the state circuit court, and (c) had been affirmed by the state supreme court through fraud, accident or mistake occurring in said court. In both cases the record facts were largely identical, although *the plaintiffs were differently situated. Mrs. Kennard,* at the time of the will construction suit and decree, was a *minor* defendant (almost fourteen years old), represented by her father as guardian ad litem.

*Mrs. McIntosh* was an *adult* defendant in the will case, served with a copy of the writ and petition therein. She *had stood mute, without appearing in either state court, or making any attempt to defend, or proving any excuse for not appearing to defend.* Partly for this reason the

United States District Court had held in her first federal suit that the will construction decree, whether right or not in its construction of the will, was res judicata as between her and Mrs. Wiggins (Phys. Ex. *530-532), and upon additional points present in the case had also held that the state circuit court had jurisdiction in the will construction case to enter the judgment that it entered (Phys. Ex. *531-532); and said District Court had adjudged that *Mrs. Wiggins was entitled to the disputed income, being the income since the death of Mrs. Kilpatrick on the other undivided one-twelfth interest in the real estate only constituting part of the trust estates* (Phys. Ex. *538-539). Said court did not construe the will (Phys. Ex. *532).

On Mrs. McIntosh's appeal from said decision the United States Circuit Court of Appeals, Eighth Circuit, had affirmed said judgment (on August 17, 1931), on a point of procedure, but in doing so had stated (*Perry v. Wiggins*, 57 F. [2d] 622, at 625), that:

> "This holding of the court results in no prejudice to the appellant as *we have carefully examined the entire record*, and *are of the view that on the merits the judgment should be affirmed*" [Certiorari denied October 10, 1932; rehearing denied November 7, 1932; 287 U. S. 609 (77 L. ed. 529)].

***Mrs. McIntosh's second federal suit*** involved the income, since the death of Mrs. Kilpatrick, upon the other undivided one-twelfth interest in *both the real and personal property* of the daughters' share of the trust estates. The District Court decided in favor of Mrs. Wiggins.

Upon appeal from said decision and decree to the United States Circuit Court of Appeals, Eighth Circuit, there was a judgment of affirmance in favor of Mrs. Wiggins, October 29, 1941 (*McIntosh v. Wiggins*, 123 F. [2d] 316; certio-

rari denied March 2, 1942, 62 S. Ct. 800; rehearing denied March 30, 1942, 62 S. Ct. 914).

The points decided by said Circuit Court of Appeals, that are pertinent to this Petition for a Writ, will be stated later in the supporting brief.

*In the instant Kennard case* the record shows (R. 208) an admission by counsel for Mrs. Kennard that, since the filing of the first suit attacking the will construction decree, Mrs. Wiggins has voluntarily caused the disputed part of the income to be set aside in a special fund in a trust company, because said income was in litigation (R. 209). This fund includes all of the income in dispute in the *McIntosh* and *Kennard* cases, except certain dividends upon shares of stock in certain realty companies. The record shows that the amount thus held by said trust company early in 1939 was about $360,000, of which one-half was in dispute in the *McIntosh* case and one-half is involved in the *Kennard* case (R. 210).

*The decision below.* In the instant case, the state circuit court found and held in favor of Mrs. Kennard and against Mrs. Wiggins, in respect of the income here in controversy. The decree is set out at R. 70-91. There was no opinion and no separate finding of facts; such findings as the trial court made were embodied in said decree.

The substance of the decree was: (a) that under the will, upon the death of Mrs. Kilpatrick on August 10, 1928, Mrs. Kennard became the owner of the herein disputed undivided one-twelfth interest in the trust estates, real and personal; (b) the disputed paragraph of the will construction decree was declared void as between Mrs. Kennard and Mrs. Wiggins, and the latter was permanently enjoined from further asserting any right, title or interest in or to the real or personal property involved, and from collecting any income therefrom by virtue of said dis-

puted paragraph; (c) that Mrs. Kennard was entitled to the possession of said disputed interest in said real and personal property; (d) the decree directed that Mrs. Wiggins transfer to Mrs. Kennard the personal property constituting the disputed interest, and also the rents and profits therefrom, received since the death of Mrs. Kilpatrick, together with all income earned upon said amounts; and (e) the court retained jurisdiction for administrative purposes, to make further orders appropriate to carry the decree into effect. The decree *contained no finding that on the appeal from the will decree, the state supreme court had in fact been deceived by any statements contained in the briefs of counsel in said court.*

The specific grounds upon which the state circuit court rendered said decree need not be stated here, because the instant petition for a writ is directed at the action of the state supreme court upon Mrs. Wiggins' appeal from said decree of the state circuit court, taken on May 29, 1940 (R. 92-93).

*The Supreme Court of Missouri* (Division One) rendered three successive opinions (decisions) in the *Kennard* case, in which it twice shifted one of the controlling reasons on which it decided the case against Mrs. Wiggins, and once changed substantially another of its original rulings.

*The original decision was rendered July 25, 1941* (a copy is at R. 245-254). It held that the judgment below should be affirmed and the cause remanded to the circuit court to make the necessary orders to render it effective (R. 254). The controlling rulings upon which said decision rested and that were challenged by Petitioner, follow:

(1) That the cited Missouri statutes (Sections 563 and 3500, R. S. Mo. 1939) *compelled the conclusion* that *the mere existence* in the Liggett will of the term "heirs of

the body," in relation to remainders following life estates, means that the disputed paragraph in the will construction decree had been wrong in its interpretation of the will (R. 247).

(2) That the construction contended for by Mrs. Wiggins that under the entire will, she had a life estate in said one-twelfth interest, as expressed in the disputed paragraph of the will decree, *is not "tenable"* (R. 249).

(3) That *because the disputed paragraph in the will decree was wrong in its interpretation of the will,* the *attorney for the guardian ad litem* of Mrs. Kennard, *in making the contention expressed in his answer in the will* construction suit, and in asking the circuit court to so construe the will, *had suggested and requested a construction that "turned out to be grievously detrimental* to the interest of the minor defendant" *with the result* "that such construction has deprived the minor defendant" over a long period of time "of the possession of income from 'several hundred thousand dollars' worth of property" (R. 252); and that the duty of the guardian ad litem was "to contend for a construction most beneficial to his ward under all the circumstances, and *he had no authority* to do otherwise" (R. 252). No finding was made that Mrs. Wiggins had been responsible for the insertion of the disputed paragraph into the will decree.

(4) That *certain* quoted *excerpts from the briefs of counsel* in *the appeal from the will decree had made statements,* by reading which *"No judge would even suspect such a construction* as that *contained in the challenged paragraph of the decree"* (R. 251).

(5) That although the disputed paragraph was in the will construction decree and said supreme court had affirmed said decree, *it was "Quite apparent,* if not conceded, *that this court's attention was not directed to the*

*disputed construction*" (R. 249), and that "whether concealed or not, *it was given but scant attention*, and *there were statements in the briefs*, in effect, *contrary to the construction in the challenged paragraph*" (R. 250).

(6) That the pleadings and proof "Amply support the judgment below *and show that the action of the guardian ad litem by his attorney, in going beyond any authority he had, caused a decree to be entered which limited the rights of his ward*" (R. 253-254).

*On August 4, 1941*, a "*motion for rehearing*" in respect of said original opinion of the state supreme court rendered July 25, 1941, and a separate "motion to withdraw and modify" said opinion, were duly filed for Mrs. Wiggins. Considered together, they made the following contentions, which will be merely stated here. Those relevant to this petition for a writ will be argued in the supporting brief.

(A) That neither of the cited Missouri statutes have any *mandatory* effect on the construction of the disputed paragraph of the Liggett will, because: (a) both the history and purpose of said statutes demonstrate that they were intended to apply only to conveyances of real estate; (b) as applied to wills of personal property, said statutory meaning of "heirs of the body," if applied, is "only by way of analogy and as a rule of construction" rather than a mandatory rule of property; and (c) said statutory meaning, being a mere court-made rule, yields to "a contrary intent of the conveyor found from additional language or circumstances," and in the Liggett will there is such a clearly expressed contrary intent.

(B) That the meaning of the disputed paragraph of the will, as gathered from its four corners, was before said supreme court for consideration and decision in this *Kennard* case, but said court failed (in effect refused)

to discuss or decide it. This was contrary to the uniform procedure established by said court in earlier analogous cases that said statutory rule of construction would not be applied without first examining the entire will to ascertain whether it expressed an intent not in accord with the statutory rule,—and if it did,—such intent prevailed; that such refusal was a denial of due process, and that the arbitrary and unreasoned statement in said opinion, that the construction contained in the disputed paragraph is not "tenable" (R. 273), amounted to a denial of an interpretation of the will from its four corners and a denial to Mrs. Wiggins of the "day in court" to which she was entitled.

(C) That the rulings of the court were arbitrary, unjust and unsupported by any evidence: in holding that the attorney for Mrs. Kennard's guardian, rather than the circuit court, was legally responsible for the presence of the disputed paragraph in the will decree (R. 275); in holding that the act of said attorney in making an affirmative contention concerning the will was legally unauthorized notwithstanding the fact that in earlier decisions by said court it had treated similar conduct as valid, and without criticism or condemnation of the guardian or attorney involved (R. 277-280); and in holding that the act of said attorney, under the circumstances, constituted a fraud upon Mrs. Kennard (R. 280-281).

(D) That it is indisputable of record: that Mrs. Kennard was herself responsible for most of the long delay (mistakenly attributed by said opinion to the attorney for her guardian), by having neglected to sue out a writ of error within the statutory period and instead of resorting to said available, prompt and adequate statutory remedy, by having expended about five years in futile litigation against Mrs. Wiggins; and that by said conduct she was

guilty of such negligence as in equity forfeited her right to make the instant direct attack in equity on the ground of fraud, because she did not come into court free from her own negligence.

Said motion for rehearing prayed the court to construe the will from its four corners in accord with its said established practice.

*On August 11, 1941,* said attorney for Mrs. Kennard's guardian, by leave, filed his *"suggestions as amicus curiae"* (R. 289).

*On November 5, 1941,* by leave of court, Mrs. Wiggins filed in the instant *Kennard* case copies of the opinions of the United States Circuit Court of Appeals, Eighth Circuit, rendered October 29, 1941, in the *McIntosh* case.

*First modified opinion of state supreme court. On December 16, 1941,* said court entered an order stating that on its own motion the court had modified its opinion in the cause and had overruled Mrs. Wiggins' motion for rehearing and motion to modify said original opinion.

*The principal changes* made in the original opinion, by said modified opinion, consisted of: (1) The deletion from the original opinion of the names of all counsel; (2) the deletion of the statement regarding what the answer of the guardian ad litem for Mrs. Kennard "might have been" (R. 252) and the substitution therefor of a statement largely broadening the lawful power of the guardian ad litem of a minor defendant as compared with the rigid limitation suggested in the original opinion, but holding that in the instant case the guardian had suggested and asked (and inserted in the draft for decree) a construction that turned out to be grievously detrimental to the ward (R. 360-361); and (3) the insertion, just before the last paragraph of the opinion, of the following:

"Able lawyers differ on the construction of wills and other written instruments, as the case law of all jurisdictions abundantly discloses, and *we should*, we think, *say that by this opinion we do not mean to imply that there was any conscious wrongdoing on the part of anyone connected with the will construction suit. There is nothing in the record to suggest such.* The long and honorable career of all counsel concerned belies such suggestion. *However*, as we see it, *the challenged paragraph in the will construction suit, under the facts, amounted to a constructive fraud upon the rights of the present plaintiff, a minor defendant in that suit.* And *by such fraud*, we *mean representations which cause injury to another*, although the party making the representations did not intend to deceive."

Said opinion did not grant the prayer of Mrs. Wiggins in her motion for rehearing (R. 255), that the court give "due regard" to the intent of the will by construing it "from its four corners" in accord with the state statute (Sec. 568, R. S. Mo. 1939, in effect since 1845,—R. S. Mo. 1845, p. 1086, supra), and with its established practice to do so.

*On December 26, 1941, Mrs. Wiggins filed her "motion for rehearing" and "motion to transfer to the Court in banc,"* in respect of said first modified opinion rendered December 16, 1941.

The grounds of said motion for rehearing, relevant to the instant petition for a writ, were:

(A) That said first modified opinion (decision) unlawfully deprived Mrs. Wiggins of her property without due process of law in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, in that: (a) The assumption in said opinion that the quoted representations (statements) of counsel in their appeal

briefs in the will case *in fact caused the state supreme court to affirm the will decree,* is *not supported by any evidence,* and is therefore wholly arbitrary and unconstitutional; (b) that the decisive ruling in said opinion, that absent actual fraud, *constructive fraud alone* will *suffice to set aside a judgment,* was contrary to the uniform doctrine of said court theretofore firmly established and applied in other cases, as the law in Missouri (R. 368); (c) that said decision was arbitrary and unjust to Mrs. Wiggins in penalizing her for the act of counsel for Mrs. Kennard in making said affirmative defense for Mrs. Kennard's guardian, an act for which Mrs. Wiggins was in no way responsible; and (d) that said decision was arbitrary and unjust in penalizing Mrs. Wiggins for the long delay caused by Mrs. Kennard in neglecting to avail of the prompt and adequate statutory remedy by writ of error from the state supreme court to the state circuit court, in the will case, available to her within three years after she became twenty-one years old.

*Mrs. Wiggins' said "motion to transfer"* the instant case to the state supreme court in banc rested upon the Constitution of Missouri, Section 4 of the Amendment of 1890, to Article VI (R. S. Mo. 1939, Vol. 1, p. 127c, copied earlier herein), which applied to decisions by a division of said court, and made it mandatory to transfer when a federal question was involved.

Said motion invoked both the discretionary power and the mandatory duty of said court under said constitutional provision, to transfer the case to the entire court. The specific grounds included those contained in said motion for rehearing, also the contention that said modified decision had denied "due process" to Mrs. Wiggins by refusing her earnest request that the court construe the will from its four corners and by a *reasoned* opinion, instead of ruling arbitrarily that her contention concerning the in-

tent, was *"not tenable."* The mandatory duty to transfer was invoked expressly on the ground that the cause involved "a federal question," based on a denial of "due process" (R. 380).

*On January 23, 1942, the attorney who had represented Mrs. Kennard's guardian* in the will case, filed in the state supreme court, *as amicus curiae, "Additional Suggestions"* in the instant *Kennard* case, asking that there be stricken from said first modified opinion the Court's characterization as "a constructive fraud" upon Mrs. Kennard of the answer he had filed on her behalf in the will case (R. 289-299).

*On February 26, 1942, the state supreme court rendered its second modified and final opinion* (decision) in the instant *Kennard* case (R. 393-405), and entered its order stating that it did so of its own motion; by the same order it overruled Mrs. Wiggins' said motion for rehearing and motion to transfer that were addressed to the court's first modified opinion rendered December 16, 1941 (R. 392-393).

The only change made in the form of its third (final) opinion rendered December 16, 1941, consisted in the deletion from the second last paragraph of said second opinion of the following:

> "However, as we see it, *the challenged paragraph in the will construction suit,* under the facts, *amounted to a constructive fraud* upon the rights of the present defendant in that suit. And by such fraud, we mean *representations which cause injury to another, although the party making the representations did not intend to deceive"* (citing cases; omitted here),

and in the substitution therefor of the following:

> "However, as we see it, *the challenged paragraph in the will construction suit, under the facts, wrong-*

*fully deprived a minor defendant,* who is now the present plaintiff, of the possession of the property and the income therefrom as claimed by her in the present cause."

A copy of said decision is reported as *Kennard v. Wiggins,* 160 S. W. (2d) 706.

*On March 7, 1942, Mrs. Wiggins,* by leave of court, filed her "motion for rehearing" (R. 407-430), and separate "motion to transfer to the court in banc" (R. 429-434), both addressed to said final or second modified opinion (decision).

Said motions carried forward as their grounds, the same grounds assigned by Petitioner's motion for rehearing and motion to transfer, addressed to the first modified opinion.

They will be discussed in the supporting brief, and need not be repeated here.

*On April 16, 1942,* said state supreme court overruled Mrs. Wiggins' said motion for rehearing and motion to transfer to the court in banc, both relating to said modified opinion of February 26, 1942 (R. 440).

Thereafter, by successive orders of said state supreme court, the mandate of said court was stayed for successive periods to expire with July 15, 1942 (R. 444).

There was filed in said state supreme court a stipulation, set out at record pages 443-444, pursuant to which there was lodged with the clerk of this court as a "Physical Exhibit" herein, the only two available copies of a printed, blue covered, "Abstract of Record" in *Wiggins et al. v. Perry et al.,* No. 33,582, in the supreme court of Missouri, containing 591 pages, which was introduced in evidence at the trial of the instant case in the state circuit court, and which constitutes a substantial part of the record evidence referred to in the foregoing statement and

which is relevant and important in connection with the instant petition for a writ. Said stipulation further provided that said two copies of said Physical Exhibit may be filed in this Court, and may and shall, if this Court shall permit, be considered and treated herein as a physical exhibit constituting part of the certified transcript of record in the above-entitled cause, for the use of this Court in connection with its consideration of this petition.

**Opinions and Rulings Below, and in McIntosh v. Wiggins a Companion Case on Many Points Here Involved.**

The circuit court, City of St. Louis, did not render an opinion, but entered on February 5, 1940, its decree embodying its findings therein (R. 69-91). The general nature of said decree has been stated above.

The third and final (or second modified) opinion of the supreme court of Missouri, on the appeal of Ella L. Wiggins from said decree, is reported as *Kennard v. Wiggins*, in 160 S. W. 2d 706. The points decided and judgment rendered are explained in the "Statement" herein.

In the companion case, *McIntosh v. Wiggins*, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri handed down no opinion, but announced and filed its Findings of Fact and Conclusions of Law, with Directions for Judgment in favor of Mrs. Wiggins. The opinions (majority and minority) of the United States Circuit Court of Appeals, Eighth Circuit, on Mrs. McIntosh's appeal in said cause, are reported as *McIntosh v. Wiggins*, in 123 F. 2d 316. The decree below was affirmed. Being relevant here as an authority not as a decision below in the instant (*Kennard*) case, the pertinent rulings will be stated in the Argument, in the supporting brief.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Supreme Court of Missouri (Division One) denied to Petitioner the "due process of law" guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motion that said Division One transfer the instant case to said entire court (in banc), as required by the Constitution of Missouri, Article VI; Section 4, of Amendment of 1890; R. S. Mo. 1939, Volume I, page 127c, in cases when a federal question is involved.

Section 4, of Amendment of 1890, to Article VI, of Constitution of Missouri; Rev. Stat. of Mo. 1939, Vol. 1, page 127c.

Gorman v. Washington University, 62 Sup. Ct. Rep. 962, at 963.

Scott v. McNeal, 154 U. S. 34, at 45; 38 L. Ed. 896, at 901.

II. Said state supreme court denied to Petitioner such "due process," by failing to sustain her contention, supported by the established doctrine of said court and of this Court, that even if Petitioner had been guilty of the alleged fraud in said state courts, Respondent could not recover against Petitioner in this direct attack in equity to have the disputed paragraph of the will construction decree held void, because Respondent had completely neglected to avail herself of the prompt, available and adequate other remedy, provided by the statutes of Missouri, by suing out a writ of error from said state supreme court within three years after she became twenty-one years old,—by which writ she could have obtained complete relief from the alleged consequences of such alleged fraud, by

having the decree corrected if wrong, and if prejudicial to Respondent.

Rev. Stats. Mo. 1939, Sections 1200 and 1202.
Spotts v. Spotts, 331 Mo. 917, at 931; 55 S. W. 2d 977, at 983.
34 C. J., Sec. 782, p. 495.
Cantwell v. Johnson, 236 Mo. 575, at 600; 139 S. W. 365, at 374.
Perkins v. St. L. K. C. & Col. R. R. Co., 143 Mo. 513, at 519; 45 S. W. 260, at 261.
Knox County v. Harshman, 133 U. S. 152, at 154; 33 L. Ed. 586, at 588.
Marshall v. Holmes, 141 U. S. 589, at 596; 35 L. Ed. 870, at 873.
Not in point are: Anderson v. Biddle, 9 Mo. 580. Padgett v. Smith, 205 Mo. 122. Harburg v. Arnold, 87 Mo. App. 326.

Arbitrary action by the highest court of a state, prejudicial to a litigant, constitutes a denial of due process.

Scott v. McNeal, 154 U. S. 34, at 45; 38 L. Ed. 896, at 901.
Giozza v. Tiernan, 148 U. S. 657, at 662; 37 L. Ed. 599, at 601.

III. Said court denied to Petitioner said due process, by holding and adjudging that the pleadings and proof in the instant case "amply support the judgment below" and accordingly by affirming the decree herein of the state circuit court in favor of Respondent and against Petitioner, although said decision was not supported by any substantial evidence as against Petitioner, and being wholly arbitrary as to her, unlawfully deprived her of her property without due process, in violation of said Amendment to the Federal Constitution.

Section 1 of Article XIV of the Amendments to the Constitution of the United States.
McIntosh v. Wiggins, 123 F. 2d 316, at 319, 321, 322.

U. S. v. Throckmorton, 98 U. S. 61, at 68; 25 L. Ed. 93, at 96.
Cantwell v. Johnson, 236 Mo. 575, at 601; 139 S. W. 365, at 374.
Wiggins v. Perry, 119 S. W. 2d 839, at 844.

IV. Said court denied to Petitioner such due process of law:

(1) By arbitrarily and unjustly penalizing her by its decision and judgment, for the acts of the attorney for Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state circuit court to construe the will in harmony with said contention,—acts for which Petitioner was not responsible in any way;

(2) By arbitrarily and unjustly penalizing Petitioner for the long delay caused chiefly by Respondent having neglected to sue out a writ of error within the time allowed by state statute, and also caused by said act of the attorney for Respondent's guardian, in making on her behalf the above mentioned affirmative defense; and

(3) By arbitrarily and unlawfully holding, contrary to the law and the undisputed facts, that said guardian ad litem for Mrs. Kennard, by his attorney, in making said affirmative defense, "went beyond any authority he had" and thereby "caused a decree to be entered which limited" her "rights"; and by thereupon treating said holdings as a basis for the instant decision for Mrs. Kennard and against Mrs. Wiggins.

Spotts v. Spotts, 331 Mo. 917 at 921, 924, 930-931, 932; 55 S. W. 2d 977 at 978, 980, 983-984.
Fiene v. Kirchoff, 176 Mo. 516 at 522, 526, 527; 75 S. W. 608 at 609-611.
McIntosh v. Wiggins, 123 F. 2d 316, at 321.

V. The raising of the federal question in the instant case was timely, although it did not occur until the case reached the state supreme court.

Missouri ex rel. Mo. Ins. Co. v. Gehner, 281 U. S. 313 at 319-320; 74 L. Ed. 870 at 875, 876.
Saunders v. Shaw, 244 U. S. 317 at 320; 61 L. Ed. 1163 at 1165, 1166.

**Prayer.**

For the purpose of correcting the errors complained of and to the end that the rights of Petitioner may be determined in accordance with law, your Petitioner respectfully prays: That a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Missouri, commanding it to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and proceedings of said state supreme court in the above-described cause, being Docket No. 37,396 on the docket of said court, to the end that the decision and judgment of said state supreme court in the above-entitled cause may be reviewed by this Honorable Court as provided by law; that said decision and judgment shall so be reviewed by this Court; that pursuant to the stipulation of the parties (R. 443-444) the Court permit the two copies of the Physical Exhibit (filed with the Clerk) to be treated for the purpose of this Petition as part of the transcript of record herein; and that your Petitioner may have such other and further relief as to this Court may seem appropriate.

ELLA L. WIGGINS,

By HARRY W. KROEGER,
DANIEL N. KIRBY,
Attorneys for Petitioner.